

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 MIGUEL A. CRUZ and JOHN D.) Case Nos. 07-04012-SC
8 HANSEN, individually and on)
behalf of all others similarly) Related Cases: 07-02050-SC
9 situated,)
)
10 Plaintiffs,)
)
11 v.) ORDER GRANTING DEFENDANT'S
12 DOLLAR TREE STORES, INC.,) MOTION TO ENFORCE PROTECTIVE
) ORDER
13 Defendant.)
14 _____)
15 ROBERT RUNNINGS, individually)
16 and on behalf of all others)
similarly situated,)
17)
18 Plaintiff,)
19)
20 v.)
21 DOLLAR TREE STORES, INC.,)
22 Defendant.)
23 _____

24 **I. INTRODUCTION AND BACKGROUND**

25 Now before the Court is Defendant Dollar Tree Stores, Inc.'s
26 ("Dollar Tree") motion to enforce a protective order against
27 Plaintiffs' counsel, Scott Cole & Associates ("Plaintiffs'
28

1 Counsel").¹ ECF No. 361 ("Mot."). Specifically, Dollar Tree
2 seeks to enforce a December 9, 2011 stipulated protective order
3 that provides, in relevant part: "Within thirty (30) days following
4 final disposition of this action, counsel for the parties shall
5 assemble and return to each other all Confidential Information . .
6 . ." Case No. 07-0250 ECF No. 41 ("Protective Order") ¶ 16. Since
7 Plaintiffs voluntarily dismissed this action, Plaintiffs' Counsel
8 have returned hard copies and CDs of confidential documents
9 produced by Dollar Tree through discovery but have insisted on
10 retaining an electronic archival copy of these confidential
11 documents. ECF 361-2 * "McClain Decl.") ¶¶ 21-23, Exs. G-J.
12 Plaintiffs' Counsel argues that California Rule of Professional
13 Conduct 4-100(B)(3) requires it to retain this archive as part of
14 Plaintiffs' client file for not less than five years. Opp'n at 4.
15 The Court finds that Rule 4-100(B)(3) requires no such thing and,
16 accordingly, GRANTS Dollar Tree's Motion.

17

18 **II. DISCUSSION**

19 Rule 4-100(B)(3) requires an attorney to retain a complete
20 record of all client funds and other properties coming into the
21 possession of the attorney for at least five years after the
22 conclusion of a litigation. Specifically, the rule requires that
23 an attorney:

24 Maintain complete records of all funds, securities, and
25 other properties of a client coming into the possession
26 of the member or law firm and render appropriate accounts
27 to the client regarding them; preserve such records for a
period of no less than five years after final appropriate
distribution of such funds or properties; and comply with
any order for an audit of such records issued pursuant to

28 ¹ The Motion is fully briefed. ECF No. 363 ("Opp'n"), 364
("Reply").

1 the Rules of Procedure of the State Bar.
2 Cal. Rule of Prof. Conduct 4-100(B)(3) (Emphasis added).
3 Plaintiffs' Counsel interprets the term "other properties" to
4 include all client files as well as confidential documents produced
5 by an opposing party through discovery. Opp'n at 4-5.

6 Plaintiffs' Counsel's reasoning is predicated on two opinions:
7 Ramirez v. Fuselier, 183 B.R. 583, 587 (B.A.P. 9th Cir. 1995); and
8 White v. Experian Information Solutions Inc., NO. SACV 05-1070 DOC,
9 2009 U.S. Dist. LEXIS 117979 (C.D. Cal. Nov. 23, 2009). These
10 cases stand for the proposition that the client file, particularly
11 attorney work product, may be considered the property of the
12 client.² However, neither case indicates that the client file
13 includes confidential material produced by an opposing party or
14 that an attorney has an obligation to retain such material.

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16 ² In Ramirez, the Court held that a creditor's seizure of a debtor-
17 attorney's client files violated the automatic bankruptcy stay.
The Court reasoned:

18 Under California Rules of Professional Conduct, attorneys
19 are considered fiduciary custodians of client files and
20 are required to keep and maintain such files for five
21 years after the conclusion of a case. It is well settled
22 under California law that an attorney has a duty to
23 promptly surrender any communicated work product
24 contained in an attorney's litigation file upon request
25 of the client. [Citation]. The California Supreme Court
26 has also noted that it is unacceptable for an attorney to
27 require clients to repossess their own files from an
28 attaching creditor. [Citation.]

29 Ramirez, 183 B.R. at 587-88.

30 In White, a number of class members moved the Court to
31 reconsider its grant of preliminary approval of a class action
32 settlement on the grounds that plaintiff's counsel had engaged in
33 misconduct. 2009 U.S. Dist. LEXIS 117979, at *10. In pursuit of
34 evidence for their objections to the settlement, these class
35 members moved for class counsel to produce their internal emails.
36 Id. at *12. The Court ordered the class counsel to turn over the
37 client file, but found that class counsel could withhold their work
38 product as privileged. Id. at *22-25.

1 Nor does a close reading of Rule 4-100 support Plaintiffs' 2 Counsel's position. Chapter 4 of the California Rules of 3 Professional Conduct pertains to "financial relationships with 4 clients." Along those lines, Rule 4-100 deals primarily with 5 preserving the identity of funds and other property held in trust 6 for a client. While the scope of a client's property under Rule 4- 7 100 may have been expanded to include attorney work product, see 8 Ramirez, 183. B.R. at 587-88, the Court is aware of no authority 9 which has further broadened the rule so as to encompass the 10 confidential information disclosed by an opposing party through 11 discovery. Indeed, it strains credulity to suggest that another 12 party's confidential materials become the property of a client when 13 they are produced in discovery pursuant to a protective order. 14 Further, reading Rule 4-100 so broadly would hamper the private 15 resolution of discovery disputes. Parties might be unwilling to 16 stipulate to protective orders or otherwise disclose confidential 17 documents if they know that those documents could be retained by 18 opposing counsel indefinitely.

19 The Court's reasoning is further buttressed by California Rule 20 of Professional Conduct 3-700(D). Rule 3-700(D) provides that, 21 upon termination of employment, an attorney shall, "[s]ubject to 22 any protective order or non-disclosure agreement, promptly release 23 to the client . . . all client papers and property." In other 24 words, an attorney need not provide a client with confidential 25 material subject to a protective order. As Dollar Tree points out, 26 it would be unreasonable to interpret Rule 4-100 to mean that an 27 attorney is obligated to retain for the client confidential 28 material subject to a protective order when Rule 3-700(D) states

1 that a client is not entitled to retrieve such materials.

2 For these reasons, the Court finds that the terms of the
3 Protective Order concerning the return of confidential materials
4 trump any obligations that might arise out of Rule 4-100.
5 Accordingly, Dollar Tree's motion to enforce the Protective Order
6 is GRANTED.

7 Dollar Tree has also asked the Court to order Plaintiffs'
8 Counsel to pay its attorney's fees for bringing the instant motion.
9 Mot. at 9-10. Federal courts may "levy sanctions, including
10 attorneys' fees, for willful disobedience of a court order . . . or
11 when the losing party has acted in bad faith, vexatiously,
12 wantonly, or for oppressive reasons . . ." Fink v. Gomez, 239
13 F.3d 989, 991 (9th Cir. 2001) (internal quotations and citations
14 omitted). Sanctions are not appropriate here. Plaintiffs' Counsel
15 retained an electronic archive of Dollar Tree's confidential
16 information because it believed it had an ethical obligation to do
17 so. While this position was overly cautious and ultimately
18 incorrect, there is no indication that it was taken in bad faith.
19 Accordingly, Dollar Tree's request for attorney's fees is DENIED.

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21 **III. CONCLUSION**

22 Dollar Tree's Motion to Enforce the Protective Order is
23 GRANTED. Plaintiffs' Counsel is hereby ORDERED to remove from
24 their server and return all electronic archival copies of Dollar
25 Tree's confidential material to counsel for Dollar Tree no later
26 than seven (7) days after the publication of this Order.
27 Plaintiffs' Counsel is further ordered to certify in writing that
28 (a) they have returned all electronic archival copies of Dollar

1 Tree's Confidential material except (i) copies of all papers and
2 documents containing confidential material filed with the Court,
3 and (ii) their work product (including documents used to develop
4 legal thoughts and litigation strategy) that contains Dollar Tree's
5 confidential material, and that (b) such retention is subject to
6 the express terms of the Protective Order and that Dollar Tree's
7 confidential material shall not be used in other litigation.
8 Dollar Tree's request for attorney's fees is DENIED.

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10 IT IS SO ORDERED.

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12 Dated: May 16, 2012


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UNITED STATES DISTRICT JUDGE